Catherine D. Taylor
Associate General Counsel
cdtaylor@scana.com

February 7, 2005

The Honorable Charles Terreni
Chief Clerk/Administrator
South Carolina Public Service Commission
101 Executive Center Drive (29210)
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Application of South Carolina Electric & Gas Company for Adjustments in the Company's Electric Rate Schedules and Tariffs

Dear Mr. Terreni:

Enclosed for filing are the original and ten (10) copies of **South Carolina Electric & Gas Company's Response In Opposition To Columbia Energy LLC's Petition For Clarification Or Reconsideration of Order No. 2005-2**. Please accept the original and ten copies for filing. Also, please file stamp the extra copy of SCE&G's Response which will be in the possession of my courier and return same to my courier for completion of my files.

Please note that all parties of record are being served with SCE&G's Response and a certificate of Service is attached to that effect.

If anything further is required of the Company regarding this filing, please advise.

Very truly yours,

SOUTH CAROLINA ELECTRIC & GAS COMPANY

Catherine D. Taylor

Catherine D. Taylor

cc: Dr. James Spearman
Jocelyn Boyd, Esquire
(all parties of record)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-178-E

IN RE:	)	
SOUTH CAROLINA ELECTRIC & GAS COMPANY – APPLICATION FOR ADJUSTMENTS IN THE COMPANY'S ELECTRIC RATE SCHEDULES AND TARIFFS	)	**SOUTH CAROLINA ELECTRIC & GAS COMPANY'S RESPONSE IN OPPOSITION TO COLUMBIA ENERGY LLC'S PETITION FOR CLARIFICATION OR RECONSIDERATION OF ORDER NO. 2005-2**

On January 6, 2005, the Public Service Commission of South Carolina ("Commission") issued an Order Approving Increase in Electric Rates and Charges, Order No. 2005-02 ("Order"), in the above-docketed matter. On or about January 10, 2005, Columbia Energy LLC ("Columbia Energy") received notice of the Order. On or about January 19, 2005, Columbia Energy filed a Petition for Clarification or Reconsideration of Order No. 2005-2 ("Petition") challenging the Commission's Order on a single point, namely, whether or not the Commission erred in deciding to "open a generic docket to explore a formal RFP process for utilities that are considering alternatives for adding generating capacity." Order at 51; Petition at ¶¶ 2-3. South Carolina Electric and Gas Company ("SCE&G") submits this response in opposition demonstrating that the Petition lacks legal or factual support and therefore should be denied.

ARGUMENT

1. The Commission acted within its statutory authority in deciding to open a generic docket.

The only assertion of error in Columbia Energy's Petition is that the Commission's "decision to conduct the examination in the form of a generic proceeding is in violation of the Administrative Procedures Act . . . and is therefore affected by an error of law." Petition at ¶3. Columbia Energy cites no authority to support this assertion and none exists. As Columbia Energy recognizes elsewhere in its petition, the Commission is fully within its rights in this context either a) to conduct a formal rulemaking, or b) to issue an interpretive rule. Petition of Columbia Energy at p. 3, citing Young v. Department of Highways and Public Transportation, 287 S.C. 108, 336 S.E.2d 879, 882-3 (Ct. App 1985). The choice between rulemaking and interpretive rule is clearly discretionary with the Commission.

Interpretive rules provide guidance to the parties and are entitled to great respect in the courts. Id. They are, however, far more flexible than regulations which are binding on the Commission and the courts as written regardless of changing circumstances or evolving conditions in the industry. Furthermore, regulations require publication in the State Register, review by the General Assembly and codification in the Regulations Section of the Code of Laws of South Carolina. S.C. Code Ann. §§ 1-23-120, 1-23- 90, 1-23-40. Regulations may be modified only through a similar process. Clearly there are advantages to proceeding by interpretive rules as opposed to the promulgation of formal regulation in the context of rapidly changing wholesale electric markets. The choice is the Commission's and there is no error of law in choosing interpretive rules over regulations in this context..

The analysis begins by placing Columbia Energy's assertion in context with the record before the Commission. In the course of the hearing in this docket, Columbia Energy advanced

the idea of requiring electric utilities to issue requests for proposals ("RFPs") for future generation needs. Order at 49. Considering the information before it, the Commission determined that the idea was worth exploring and decided to open a generic docket. Specifically, the Order states:

> The use of a formal competitive solicitation process, under appropriate circumstances, could produce low-cost, reliable power resources for South Carolina customers. . . .
>
> The question of the merits of competitive bidding as a tool for identifying, pricing, and procuring new capacity is not limited to SCE&G. If it has benefits that suggest it should be the required method for obtaining new capacity, these benefits will be **common to all South Carolina jurisdictional electric utilities. All these utilities, and their customers and suppliers, should have the same opportunity to advise the Commission on the questions raised by the Columbia Energy proposal**. . . . The Commission will want to consider the extent to which these elements of the process can be allowed to vary from utility to utility, assuming that the Commission concludes all utilities should undertake some form of bid process.
>
> Accordingly, as part of its examination of competitive bidding, **the Commission will want to gather an array of options and opinions about the optimal way to implement a competitive bid process. To explore these issues, the Commission will open a generic docket to explore a formal RFP process for utilities that are considering alternatives for adding generating capacity.**

Order at 51-52 (emphasis added).

Does the Commission have the power to issue such a decree? Certainly. The Commission's general statutory authority to address issues such as the power generation needs of jurisdictional electric utilities is found in S.C. Code Ann. sections 58-3-140(A) and 58-27-140(1), which state, respectively, that the "commission is **vested with power and jurisdiction** to supervise and regulate the rates and **service** of every public utility in this State and **to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed**, and followed by every public utility in this

State," and the Commission may "[a]scertain and **fix just and reasonable standards**, classifications, regulations, **practices** or service to be furnished, imposed, observed, or followed **by any or all electrical utilities**." (Emphasis added). See S.C. Code Ann. Regs. 103-810(A) (the Commission performs the function of "regulation and supervision of privately-owned electric utilities as to rates, charges, services, facilities, practices, accounting procedures. . . .").

It is clear the decision and discretion to open a generic docket falls squarely within the Commission's statutory authority. First, the governing statutes provide the Commission with broad powers for the regulation of electric utilities, including the supervision of services and the fixing of practices. The statutory language specifically includes the power to "fix just and reasonable standards . . . [and] practices" for electrical utilities in addition to the authority to "supervise and regulate the rates and service" of every public utility in South Carolina. If the legislature had meant to require the Commission to perform every task through a formal rulemaking under the APA, it would have so stated.[1] Rather, the General Assembly specifically made the Commission's rulemaking powers permissive. S.C. Code Ann. § 58-27-150 ("The Commission **may** make such rules and regulations not inconsistent with law as may be proper in the exercise of its powers or for the performance of its duties under this chapter, all of which shall have the force of law.") (emphasis added). In summary, these statutes granting broad statutory powers to regulate practices of electric utilities plus permissive (not mandatory) rulemaking power conclusively defeat Columbia Energy's assertion that the Commission is bound in an administrative straightjacket limited only to a formal APA rulemaking proceeding. Cf. German Evangelical Lutheran Church of Charleston, S.C. v. City of Charleston, 352 S.C.

[1] There is no affirmative duty in the APA to formally promulgate regulations. The APA simply sets forth the procedure for formal promulgation if and when an agency decides to take such action. Further, a review of the definition of "regulation" in the APA contains numerous exemptions, such as "decisions or orders in rate making, price fixing, or licensing matters," and clearly not all agency actions are encompassed by the term. See S.C. Code Ann. § 1-23-10(4).

600, 576 S.E.2d 150, 153 (2000) (discussing the statutory construction principles of "expressio" and "inclusio").

Does Columbia Energy's assertion receive a different reception in the South Carolina Supreme Court? No. In fact, very similar statutory language has been construed to allow the Commission broad discretion in implementing its legislatively granted authority. Directly on point, in the case of Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948), the South Carolina Supreme Court opined:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. . . . [I]n the absence of such limiting factors it is not to be doubted that such **a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it.** To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.

Id. at 567 (emphasis added.). The statutory language at issue in Beard-Laney is quite similar (and identical in intent) to the language contained in the applicable section in the present case. Compare Beard-Laney, 49 S.E.2d at 566 (quoting one governing statute providing that "the commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State") with S.C. Code Ann. § 58-3-140(A) (the "commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State."). The principle of law related to implied powers as expressed in Beard-Laney is not needed here, though, because the express statutory language is so clear and on point. See S.C. Code Ann. §§ 58-27-220, -230 (providing that the Commission has such powers necessary to carry out its powers and duties in addition to any expressly enumerated power). However, if implied powers were needed, then the Commission's decision to open a

generic docket to enable it to exercise its express powers to fix just and reasonable "practices" would be appropriate and consistent with long-standing Commission practice.

In making its unfounded assertion, Columbia Energy completely ignores the Commission's enabling statutes, cited above, as well as past practice and precedent. As discussed infra in section 3, the decision to open a generic docket follows the long-standing practice of the Commission to investigate issues having general application to a particular industry through a generic proceeding. See Beard-Laney, 49 S.E.2d at 567 ("[T]he fact that this view of the powers of the Commission has been an administrative practice for some years . . . is entitled to weight as against any doubt that might arise from a strained or narrow construction of the governing statutes.").

As the Commission noted in its Order, a generic docket to explore the merits of this RFP process proposal will provide all interested parties with an opportunity to participate and "advise the Commission on the questions raised by Columbia Energy's proposal." Order at 51-52. In sum, it simply cannot be seriously argued that the Commission's opening of a generic docket to investigate an issue that falls so clearly within its statutory authority results in an error of law.

2. The difference between an interpretative rule and a legislative rule or regulation is irrelevant to whether the Commission may lawfully conduct a generic proceeding.

In its Petition, Columbia Energy expends much effort distinguishing between an interpretative rule (or policy statement) and a legislative rule or regulation (or the formally promulgated rule with legislative approval). At this stage, the distinction is superfluous and only serves to deflect attention from the real issue, i.e., whether the Commission has the authority to open a generic docket to consider whether an RFP process should be required.[2] The answer is

[2] Columbia Energy presupposes that the Commission will conclude that an RFP process should be implemented – the outcome Columbia Energy desires – and urges the Commission to limit its options by choosing

clear – it can. Columbia Energy attempts to hide its disagreement with the *method* the Commission has chosen to investigate the merits of an RFP process by obscuring the issue with arguments about policy statements versus regulations. These arguments are simply wrong in the context of examining the Commission's statutory power. The present question is simple – whether the Commission has the legal authority to open a generic docket to explore the issue, and the undisputed answer is "yes."

In addition, Columbia Energy asserts that an order from this Commission in a generic proceeding would not have the force and effect of law nor bind the jurisdictional electric utilities. Petition at ¶8. However, Columbia Energy chooses to ignore clear and controlling legal authority which refutes its assertion. The governing statute provides in pertinent part: "Each electrical utility . . . shall obey and comply with all requirements of every order, decision, direction, rule or regulation made or prescribed by the [Commission] . . . in any way relating to or affecting the business of such electrical utility." S.C. Code Ann. § 58-27-40; see S.C. Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co., 308 S.C. 216, 417 S.E.2d 586, 587 (1992) ("Orders issued under the powers and authority vested in the [Commission] have the force and effect of law.") Assuming the Commission follows its own rules and practices and accords jurisdictional electric utilities with adequate notice and an opportunity to fully and fairly participate in the generic proceeding, then the electric utilities would be bound by a final order in the docket. Thus, a purported concern that the results of the generic proceeding would not bind electric utilities is absurd and legally incorrect.

---

one method of implementing a decision that the Commission *has not yet made*. In the Order, the Commission clearly recognizes that this issue is one for consideration, but the Commission does *not* conclude that the RFP process should in fact be implemented. Order at 52 ("The Commission will want to consider the extent to which these elements of the process can be allowed to vary from utility to utility, *assuming that the Commission concludes all utilities should undertake some form of bid process*.") (emphasis added).

3. Establishing a generic docket accords with past practice.

Using a generic proceeding as outlined in the Order is a proper tool for gathering information on the potential costs and benefits of an industry-wide issue, such as competitive bidding through an RFP process, and is consistent with prior Commission practice. The language of the Order makes it clear that at this stage the Commission seeks, first, to evaluate the competitive bidding process and its potential ramifications on the industry and the public and, second, to determine whether the Commission should mandate such an RFP process in all, some, or no cases.

The Commission is recognized as an expert in its field of utility regulation. See Heater of Seabrook v. Public Serv. Comm'n of S.C., 332 S.C. 20, 503 S.E.2d 739 (1998). Thus, it is appropriate for the expert in the field to initiate a generic proceeding that provides notice, an opportunity to be heard, and due process to all interested parties, including the jurisdictional electric utilities, customers, suppliers, and others, such as Columbia Energy, in order to fairly evaluate and consider an issue that the Commission has determined has industry-wide impact. See Order at 51-52 (stating that the issue is "common to all South Carolina jurisdictional electric utilities" and that the effects of elements of the proposed process may "vary from utility to utility.").

The Commission has often opened generic dockets to evaluate issues of industry-wide significance. In In Re Petition of HTC Communications, Inc., Order No. 2002-450, Docket No.

2002-66-C, 2002 S.C. PUC LEXIS 12 (June 12, 2002), the Commission undertook a similar review and stated:

> Industry-wide issues, such as performance measures governing ILEC processes are properly addressed in generic proceedings in which all interested parties may participate. The Commission has previously recognized this principle. . . . *These issues concerning performance measurements will impact all the CLEC's operating in South Carolina as well as ILECs, other than Bell South. It is more appropriate to address these issues in the context of that generic proceeding* . . . .

Id. at *165-166 (emphasis in original). Likewise, in In Re Watson v. Horry Telephone Cooperative, Order No. 2004-466, Docket No. 2003-221-C, 2004 S.C. PUC LEXIS 248 (Oct. 5, 2004), the Commission opened a generic proceeding to gather information concerning the potential ramifications of rate classifications and rate structures for telephone lines. Similarly, the Commission opened a generic docket to "consider the potential recovery of the Subscriber Line Charge (SLC) and the Primary Interexchange Carrier Charge (PICC) through the State Universal Service Fund," another issue of industry-wide import, in In Re Proceeding to Establish Guidelines for an Intrastate Universal Service Fund, Order No. 2001-704, Docket No. 97-239-C, 2001 S.C. PUC LEXIS 9, *5.

These orders are neither isolated nor unique. The Commission has routinely opened generic proceedings to review far reaching questions and to allow potentially affected parties an opportunity to contribute relevant information. See In Re Generic Proceeding to Address Abuse of Market Position & In Re Generic Proceeding to Address Inflation Based Index, Order No. 2003-656, Docket Nos. 2002-367-C & 2002-408-C, 2003 PUC LEXIS 621 (Oct. 31, 2003); In Re Proceeding To Review BellSouth Telecommunications, Inc.'s Cost Studies for Unbundled Network Elements, Order No. 98-214, Docket No. 97-374-C, 1998 S.C. PUC LEXIS 2 (June 1, 1998).

In a memorandum opinion, the South Carolina Supreme Court endorsed the concept of the Commission creating a general docket to "further study" an issue where there was no governing policy, regulation, or order. Porter v. Pub. Serv. Comm'n of S.C., Memo. Op. No. 2003-MO-023 (March 10, 2003) (finding that the Commission's accounting treatment of fees was not arbitrary, unreasonable, capricious or contrary to law and the creation of a general docket to study the matter was not an abuse of discretion).[3]

4. Reliance on federal law is irrelevant and inapposite.

Columbia Energy's citation to federal cases regarding federal rulemaking, see Petition at ¶7, is wholly irrelevant to a discussion of South Carolina rulemaking. These are two distinct bodies of law with two different requirements and procedures for the promulgation of regulations. Any effort to compare them in this case is simply wrong and designed to obfuscate the issue. Compare S.C. Code Ann. §§ 1-23-110 to -125 (South Carolina provisions on rulemaking) with 5 U.S.C.A. § 553 (federal provisions on rulemaking); Randolph R. Lowell & Stephen P. Bates, eds., South Carolina Administrative Practice and Procedure 107-161 (2004) (chapter on South Carolina rulemaking) with Richard J. Pierce, Jr., Administrative Law Treatise 411-528 (4th ed. 2002) (chapter on federal rulemaking).

5. The issue raised by Columbia Energy is not yet ripe for determination because it has not exhausted its administrative remedies.

As a final point, Columbia Energy has not been aggrieved, harmed, or otherwise adversely affected by the Commission's decision to examine the RFP issue in a generic docket. If Columbia Energy wishes to participate in the generic docket to be opened, presumably it will be permitted to participate and advance its views. Therefore, the issue raised by Columbia

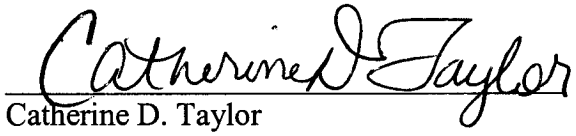
[3] This is a memorandum opinion from the South Carolina Supreme Court and does not represent precedential or binding authority. The opinion is only binding on the parties to that case. However, while not binding, it is certainly persuasive authority that Columbia Energy's position is erroneous.

Energy is simply not ripe. Cf. Nucor Steel v. South Carolina Pub. Serv. Comm'n, 312 S.C. 79, 439 S.E.2d 270, 273 (1993) (issues that the Commission opened a separate docket to address were not ripe for appeal because the administrative remedies had not been exhausted).

CONCLUSION

Columbia Energy's Petition is not supported by law. The Commission clearly has the power to open a generic proceeding and investigate whether an RFP process should be implemented, and that is the sole question presented by Columbia Energy's Petition. The rest of Columbia Energy's Petition amounts to nothing more than a disagreement with the Commission's chosen mode of investigating an issue applicable to the entire electric industry in South Carolina. The Commission provided ample support and rationale for its decision in the Order and is acting within its authority in opening a generic docket to conduct an informed and reasoned examination of the RFP process issue. Finally, Columbia Energy's Petition is not ripe for failure to exhaust its administrative remedies. Therefore, Columbia Energy's Petition should be denied.

Respectfully submitted,



Catherine D. Taylor
Associate General Counsel
South Carolina Electric & Gas Company
The Palmetto Center
1426 Main Street
Columbia, South Carolina 29201

Dalhi N. Myers
John P. Boyd
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, 22nd Floor
Columbia, South Carolina 29201
(803) 779-3080

Belton T. Zeigler
Law Office of Belton T. Zeigler
6 Calendar Court
Post Office Box 61136
Columbia, South Carolina 29206-1136
(803) 787-7055

Mitchell Willoughby
Willoughby & Hoefer, P.A.
1022 Calhoun Street, Suite 302
Post Office Box 8416
Columbia, South Carolina 29202-8416
(803) 252-3300

February 7, 2005.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-178-E

IN RE: Application of South Carolina Electric & Gas Company for Adjustments in the Company's Electric Rate Schedules and Tariffs	))))	CERTIFICATE OF MAILING

This is to certify that I, on behalf of South Carolina Electric & Gas Company, have served this day one copy of a document entitled **South Carolina Electric & Gas Company's Response In Opposition To Columbia Energy LLC's Petition For Clarification Or Reconsideration of Order No. 2005-2** upon the persons named below, at the addresses set forth and in the manner described below:

Via Hand-Delivery and Electronic Mail

Frank R. Ellerbe, III, Esquire
Bonnie D. Shealy, Esquire
ROBINSON, MCFADDEN & MOORE, P.C.
1901 Main Street, Suite 1200
Post Office Box 944
Columbia, South Carolina 29202

Via First Class Mail and Electronic Mail

Florence P. Belser, Esquire
Office of Regulatory Staff
1441 Main Street, 3rd Floor (29201)
Post Office Box 11263
Columbia, SC 29211

Scott A. Elliott, Esquire
Elliott & Elliott
721 Olive Street
Columbia, SC 29205

Frank Knapp, Jr.
S.C. Small Business Chamber of Commerce
1717 Gervais Street
Columbia, SC 29201

Audrey Van Dyke, Esquire
US Department of the Navy
Naval Facilities Engineering Command
Litigation Headquarters
720 Kennon Street, SE, Bldg 36, Rm 136
Washington Navy Yard, DC 20374-5051

Damon E. Xenopoulos, Esquire
1025 Thomas Jefferson Steet, N.W.
Eighth Floor, West Tower
Washington, DC 20007

John F. Beach, Esquire
P. O. Box 2285
Columbia, SC 29202

Ms. Angie Beehler
Wal-Mart Stores, Inc.
Energy Management Dept. 8017
2001 S. E. 10''' Street
Bentonville, AR 72716-0550

Karen Scruggs

This 1st day of February, 2005
Columbia, South Carolina